Supreme Court, U.S
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No. 05-1643

In The Supreme Court of the United States

JOHN P. HAMMER, on behalf of himself and others similarly situated,

Petitioner,

v.

CITY OF EUGENE, a political subdivision of the State of Oregon,

Respondent.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

BRIEF IN OPPOSITION

WILLIAM F. GARY
Counsel of Record
JENS SCHMIDT
JEFFERY J. MATTHEWS
JAMES E. MOUNTAIN
KARLA ALDERMAN
HARRANG LONG GARY RUDNICK P.C.
360 E. 10th Avenue, Suite 300
Eugene, OR 97401
(541) 485-0220

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), established prophylactic, *per se* rules that:

1. A government effects an uncompensated taking of property if it does not make findings of rough proportionality when it first imposes, and a landowner does not challenge, its conditions on its approval of the owner's proposed land use; and

2. A government is barred from later demonstrating rough proportionality when the landowner subsequently challenges the exactions for the first time in a lawsuit for damages for inverse condemnation.

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BRIEF IN OPPOSITION

JURISDICTION

The Court should deny summarily the petition for *certiorari* for lack of jurisdiction. Petitioner seeks review of an Oregon Court of Appeals' decision regarding an interlocutory order of a trial court in litigation of state and federal constitutional "taking" claims in which the federal issue is not yet ripe for review. The petition for *certiorari* review of a non-final order does not meet the jurisdictional requirement of 28 U.S.C. § 1257(a).

ADDITIONAL STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . , the United States.

COUNTER-STATEMENT OF THE CASE

Petitioner misstates the holding of the Oregon Court of Appeals. Petitioner resorts to rhetoric rather than record facts and focuses on matters that are beside the point of the question presented. Respondent offers this counter-statement of the case.

I. Procedural and Factual Background.

Petitioner applied to Respondent City of Eugene in 1996 for its approval of his partition of his real property. Appendix to Petition ("App.") at 7a. Respondent's planning director tentatively approved the partition on January 23, 1997, subject to certain conditions. The conditions required petitioner to: (1) provide right-of-way at the corner of one of the new parcels so that concrete walks and access ramps would be located entirely in the public right-of-way, and (2) provide a 15' x 15' public utility easement for future placement of local public utility facilities. (Appellant's Brief, Appendix at 7-8.) Respondent later added a third condition: that petitioner provide right-of-way for a sidewalk. (Ex. M to Affidavit of Kathryn Powell Dempsey in Support of Plaintiff's Motion for Partial Summary Judgment.)

In the partition approval process that Petitioner invoked – where the partition would result in parcels of minimum development size – the application to partition property was the last step in the development process in which Respondent could enforce its code requirements by imposing conditions on its approval. Respondent had no authority to do so later when it issued a building permit. (Affidavit of Jan Childs in Support of Defendant's Motion for Summary Judgment, ¶ 10.) When it approved Petitioner's application, Respondent did not make written findings concerning the degree to which the conditions of approval were roughly proportional to the impact of the proposed action. App. at 7a.

Under the local municipal code, Petitioner had the right to appeal the planning director's decision and receive a formal hearing, findings, and decision by a hearings

official. Supplemental Appendix ("Supp. App.") at 3-4 (*Former* Eugene Code ("EC") 9.030). Had Petitioner disagreed with the conclusions of the hearings official, he then could have availed himself of the State of Oregon's statutory administrative appeals processes. *See* OR. REV. STAT. § 197.805 (2005) *et seq.* (establishing a Land Use Board of Appeals). Oregon's Land Use Board of Appeals ("LUBA") has "exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency," with some exceptions. OR. REV. STAT. § 197.825 (2005). LUBA's authority includes the prerogative to review a land use decision's constitutionality. OR. REV. STAT. § 197.835(9) (2005). A party aggrieved by a LUBA decision is entitled to judicial review by the Oregon Court of Appeals. OR. REV. STAT. § 197.850(3) (2005). Upon a petition for review, the Oregon Supreme Court may review the Court of Appeals' decision. OR. REV. STAT. § 2.520 (2005).

Petitioner, however, did not appeal the decision of Respondent's planning director. Petitioner accepted without protest the conditions of tentative approval placed on his application. (Plaintiff's Response to Defendant's Request for Admissions, No. 2.) In the absence of an appeal, the planning director's tentative approval of Petitioner's application became Respondent's final decision. Supp. App. at 3 (*Former* EC 9.030(6)).

After Respondent approved Petitioner's final partition application, Petitioner sold one of the partitioned lots to his financial benefit. He retained the other lot on which he constructed three buildings, which he leases out. (Defendant's Memorandum in Response to Plaintiff's Motion for Partial Summary Judgment, pages 3-4.) Almost four years later, after approval of his land use application became

final, Petitioner filed this lawsuit against Respondent and sought compensation for the property interests he transferred to Respondent in conjunction with the final partition. App. at 8a. Petitioner brought this inverse condemnation case against Respondent as a class action in the Lane County Circuit Court for the State of Oregon. The trial court certified a class of approximately 173 persons who had filed partition applications like Petitioner's with the City of Eugene. App. at 7a, n.1. Petitioner alleged claims for an unlawful taking of his property under both Article I, section 8 of the Oregon Constitution and the Fifth Amendment to the United States Constitution. Petitioner claimed that the absence of rough proportionality findings alone established a taking. App. at 7a. Petitioner contended that Respondent should not be permitted to present evidence at trial that the conditions of approval were in fact roughly proportional to the impacts of the proposed land use application. Respondent disagreed. Following the parties' cross-motions for partial summary judgment on that issue, the trial court entered an Order Granting Plaintiff's Motion for Partial Summary Judgment, Denying Defendant's Motion for Partial Summary Judgment, Certifying Issue for Interlocutory Appeal, and Staying Trial Court Proceedings. App. at 1a-3a. The trial court ruled that Respondent's failure to make rough proportionality findings at the time of the partitions involved in this lawsuit precluded Respondent from proving at trial that the exactions were roughly proportional to the potential impacts of the partitions.

Under Oregon law, the trial court's summary judgment order normally would not be appealable. However, Oregon provides for an interlocutory appeal of class action

rulings under specified circumstances. The statute that permits such an interlocutory appeal provides as follows:

> When a circuit court judge, in making in a class action under ORCP 32 an order not otherwise appealable, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order to the Court of Appeals if application is made to the court within 10 days after the entry of the order. Application for such an appeal shall not stay proceedings in the circuit court unless the circuit court judge or the Court of Appeals or a judge thereof shall so order.

OR. REV. STAT. § 19.225 (2005).

The trial court certified this question of law for interlocutory appeal:

> Whether a city, which is sued for damages for having made an unconstitutional exaction, may attempt to prove in the case that the exaction was 'roughly proportional' to the impact of the proposed development within the meaning of *Dolan v. City of Tigard* and its progeny, notwithstanding the city's failure to have prepared written '*Dolan* findings' at the time the exaction was made.

App. at 2a.

The Oregon Court of Appeals granted Respondent's application for interlocutory appeal of the certified question. The Court of Appeals then reversed the trial court's

order and remanded the case to the trial court for further proceedings. App. at 7a, 16a. The Oregon Supreme Court declined Petitioner's petition for review of that decision. App. at 17a.

II. The Holding of the Oregon Court of Appeals.

The Oregon Court of Appeals correctly ruled that under the circumstances of this case, the Respondent was not barred from making a showing of rough proportionality between the impacts of a proposed land use and the conditions the government attached to its approval of the requested use, when a landowner first challenges the exaction:

> When, as in this case, a landowner first challenges an exaction in an inverse condemnation action, the government must be permitted to make its case that rough proportionality existed at the time of the exaction.

App. at 15a.

The court rejected as unjust Petitioner's proposed *per se* rule that a taking is proved by a lack of contemporaneous findings alone, noting:

> [The proposed rule] tells us nothing about whether justice requires compensation [and instead] would saddle taxpayers with the burden of paying compensation that justice does not require.

App. at 15a.

The court concluded that "the trial court erred in concluding that the city may not attempt to demonstrate rough proportionality at trial." App. at 16a.

The Court of Appeals reversed the trial court's order granting Petitioner summary judgment and remanded the

case to the trial court for further proceedings. App. at 16a. As a result of the decision, Respondent on remand will be permitted to introduce evidence at trial to support its position that the property exactions were roughly proportional to the impact of Respondent's approval of the land use application.

REASONS FOR DENYING THE WRIT OF *CERTIORARI*

ARGUMENT

The Court should deny the petition for writ of *certiorari* for at least two reasons. The first reason is jurisdictional. As noted above, the petition does not concern a "final judgment" and the issue it attempts to present is not ripe for review. Second, the case simply is not certworthy. The Court of Appeals' decision below correctly exposed Petitioner's claim as an unfounded and unwarranted attempt to extend *Dolan*. The lower court's decision is a well-reasoned opinion that correctly interprets *Dolan*. Moreover, the decision neither conflicts with decisions of other courts nor presents a pressing question of federal law. The Court should dismiss the petition.

I. This Court Lacks Jurisdiction To Review the Oregon Court of Appeals' Decision.

A. The petition does not concern a final judgment.

This Court's authority to conduct *certiorari* review is grounded in 28 U.S.C. § 1257(a) and confined to:

> Final judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution [of] . . . the United States.

28 U.S.C. § 1257(a).

No "final judgment" exists here.

The decision of the Oregon Court of Appeals that Petitioner asks this Court to review is not a judgment. Rather, it is a pretrial interlocutory ruling that remands the case back to the trial court for trial. App. at 7a. The trial court has not heard or determined the relevant factual issues and has not made a final determination concerning liability and compensation. All of those matters await trial upon remand. The trial court has not yet applied the appellate court's decision to Petitioner's inverse condemnation claim and no judgment on that claim has been issued.

Not only is a judgment lacking, but finality also is wanting. The Court has made it clear that to be reviewable, a judgment must be final in both the procedural sense and the substantive sense:

> "[The judgment] must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 81 (1997), *citing Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 458 (1945) (internal quotation marks omitted). This petition does not present a final judgment because Petitioner's inverse condemnation claims are

subject to further review on remand and because the Oregon Court of Appeals' decision is only interlocutory.

The Court has identified four categories of exceptional cases in which it will depart from a strict application of the word "final" in 28 U.S.C. § 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). None applies here. The first category includes cases in which "the federal issue is conclusive or the outcome of further proceedings [is] preordained." *Id.* at 479. This case resolves only a procedural aspect of the trial, *i.e.*, whether government may be permitted to present evidence of "rough proportionality."

The second category includes cases in which the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Here, further proceedings may dispense with the need to address the federal issue. For instance, the trial court may decide in favor of Petitioner on state constitutional grounds, or it may find that there is no rough proportionality on Petitioner's federal claim.

The third category of cases includes those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The issue presented in this case would remain reviewable in the event Respondent makes a showing of rough proportionality, and Petitioner does not prevail in the trial court or in Oregon's appellate courts. In that case, Petitioner would be able to ask the United States Supreme Court to review the issue presented here.

The fourth category is comprised of cases in which the "state court decision might seriously erode federal policy" if the Court refuses to review and decide the federal issue

immediately. *Id.* at 482-83. For example, *Cox Broadcasting* presented an issue concerning freedom of the press, and the Court took review because "the litigation could be terminated by our decision on the merits and [] a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . ." 420 U.S. at 486.

The instances in which the Court has accepted review of decisions that arguably lack complete finality represent unusual circumstances and compelling issues. This matter is an eminent domain case. Fifth Amendment Takings cases are emblematic of cases that do not involve other federal issues and compel *certiorari* review. *Id.* at 477 n.6, *citing North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). In an inverse condemnation case, two aspects of the federal claim must be decided for a decision to be final for purposes of 28 U.S.C. § 1257: (1) whether there was a taking; and (2) if so, what compensation must be paid to the plaintiff. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981). "A state judgment is not final unless it covers both aspects of that integral problem." *Id., citing North Dakota Board of Pharmacy*, 414 U.S. at 163.

Neither of these two questions has been decided by the Oregon Court of Appeals or the trial court. Instead, the Court of Appeals accepted an interlocutory appeal of an evidentiary question certified by the trial court so that the eventual termination of litigation would be more quickly advanced. The Court of Appeals' decision permits Respondent to introduce evidence of rough proportionality at a trial that has yet to occur, and nothing more. App. at 16a. No determination has yet been made whether Petitioner's

property was taken. No decision has yet been made concerning the value of the exactions that were taken, if indeed a taking has occurred. Because there has been no judgment, let alone a final judgment, from Oregon's highest court, this Court lacks jurisdiction. Lacking jurisdiction, this Court should deny review.

B. Even if the Oregon court's decision were final rather than interlocutory, it presents no issue of federal takings law that is ripe for review.

In his complaint in state court, Petitioner alleged inverse condemnation claims under both the Oregon and United States Constitutions. His claim under the federal Constitution, however, is not ripe for adjudication until he exhausts all available state law remedies. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (when a state "provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until [the owner] has used the procedure and been denied just compensation"). Oregon recognizes claims of inverse condemnation arising under Oregon's constitutional prohibition against taking of private property without just compensation. *See, e.g., Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 117 P.3d 990, 993-98 (Or. 2005). Petitioner's claim for inverse condemnation under the Oregon Constitution must be adjudicated before his claim for inverse condemnation under the Fifth Amendment becomes ripe. The Court should deny review here because this case presents no case or controversy for the Court to resolve.

II. Even Assuming the Court Had Jurisdiction, Review Is Not Warranted in This Case.

A. The Oregon Court of Appeals' decision is correct.

Petitioner seeks to extract a new rule from *Dolan* that would expand the concept of a taking to include situations in which a procedural failure occurs at the first stage of a land use approval. Such a concept lies beyond the scope of any published court decision. It also entails seriously detrimental practical consequences. The rule that Petitioner proposes would create a land use environment in which landowners would be rewarded for deceptive practices and public money arbitrarily would be transferred to private parties. The Oregon Court of Appeals recognized that *Dolan* does not support the Petitioner's proposed rule and that adoption of the rule would not advance the policies inherent in *Dolan*. The Court aptly concluded that, "when, as in this case, a landowner first challenges an exaction in an inverse condemnation action, the government must be permitted to make its case that rough proportionality existed at the time of the exaction." App. at 15a. The decision is well reasoned and correct, and this Court's review is not warranted.

Petitioner asserts that the "clear import" of *Dolan* is to require a public body to "demonstrate *at the time* of its demand that there is a 'roughly proportional' relationship between the property exaction and the impact of the proposed development" before it can impose an exaction. Pet. at 12 (emphasis in original). However, as the Oregon Court of Appeals correctly noted, the *Dolan* Court's many references to findings "simply reflect the procedural posture of the case." App. at 13a. The Court of Appeals had previously noted several material distinctions between

this case and *Dolan*, including whether findings had been made, the timing of the landowners' challenges, the procedures the landowners followed, and whether property had yet been conveyed. App. at 10a. The court specifically observed that *Dolan* involved a situation in which findings already had been made. *Id.* The court was unable to conclude that the *Dolan* Court "intended to create a rule with such profound consequences merely by implication and in a case in which the rule had no application." App. at 13a.

The court also rejected Petitioner's argument that either *Dolan* or the Fifth Amendment requires a prophylactic procedural rule. The court noted that the Takings Clause, one of three constitutional clauses addressing private property rights, focuses on substantive matters, while the other two (the Due Process Clauses of the Fifth and Fourteenth Amendments) address procedural issues. App. at 13a. Citing *Hurtado v. California*, 110 U.S. 516 (1884), the court concluded that interpreting the Takings Clause as imposing a procedural rule would tend to render superfluous the Due Process Clause's procedural protection. *Id.*

In addition to noting the "due process" nature of Petitioner's argument, the Oregon court observed that Petitioner's proposed rule said "nothing about whether an exaction affect[s] a taking" and "nothing about whether justice requires compensation." App. at 15a. Petitioner's proposed new rule would sweep too broadly because compensation would not be limited to takings that are *actually* unconstitutional but would be required for legitimate exactions as well.

The rule that Petitioner proposes would allow exploitation of the land use process for individual gain at public expense. A landowner could readily convey – or even propose the conveyance of – street, sidewalk, or utility easements as conditions of approval of his land use application. The landowner would then be in position to reap the benefit of the increased value of the subject property due to improved access or newly available infrastructure. The landowner could capitalize on the "taking" and, at his leisure, file an action against the government for damages based solely upon the lack of contemporaneous findings regarding the rough proportionality between the impacts and the land uses which the landowner himself had fostered. Under Petitioner's proposed rule, the governmental entity would be powerless to show that the condition was indeed justified. The government would be unable, in the proceeding in which the landowner first challenged the conditions of approval, to defend against the landowner's takings claim. The government would be required to open the public coffers to the very landowner who lulled it into not making rough proportionality findings in the first instance. As the Oregon Court of Appeals noted, Petitioner's rule "would saddle taxpayers with the burden of paying compensation that justice does not require." App. at 15a. There is no hint in *Dolan* that the Court intended such a result.

Petitioner concedes that the *Dolan* court "did not have occasion to decide the precise issue presented [by Petitioner] in this case." Pet. at 11. At the same time, Petitioner urges this Court to "make it clear to government officials that *Dolan* does, in fact, establish a prophylactic rule which cannot be ignored until after property is taken without just compensation." Pet. at 17. Petitioner's two

positions are incompatible. Despite his statements to the contrary, Petitioner is not asking this Court simply to enforce *Dolan*. He seeks this Court's creation of a new constitutional rule. The circumstances of this case do not demonstrate a need for an extension of existing law.

Petitioner contends that the Oregon Court of Appeals' decision allows governments to "impose highly onerous property exactions . . . while completely ignoring *Dolan*'s requirements[,]" and that it "authorizes the government to attempt to cure that [situation] . . . by performing a belated and after-the-fact 'rough proportionality' analysis" if the property owner sues. Pet. at 3. In fact, the court's decision does not relieve a government of the duty to act in a constitutional manner or to comply with *Dolan*. Upon remand, Respondent still has the burden to prove rough proportionality, and if it cannot meet its burden, then Respondent will have to pay just compensation.

Petitioner also contends that the court's decision allows governments "to ignore, with impunity, the constitutional requirements of 'rough proportionality' until long after the physical taking of an applicant's property is complete." Pet. at 7. Nothing the Oregon Court of Appeals said reasonably can be construed as permission to ignore *Dolan*'s substantive requirements. The Oregon Court of Appeals specifically noted that this case involves a petitioner who did not appeal the conditions of approval but instead chose to challenge them later through an inverse condemnation action. App. at 15a. The delay in showing rough proportionality in this case is attributable to Petitioner's own actions, not to Respondent.

B. The Oregon Court of Appeals' decision does not conflict with any decision of any state court of last resort or any decision of any U.S. Court of Appeals.

The Court's review is not warranted here because the petition presents no split of judicial authority that requires this Court's immediate attention. Only one other appellate court has directly considered the issue addressed by the Oregon Court of Appeals, and that court rejected the interpretation of *Dolan* espoused by Petitioner. *See Town of Flower Mound v. Stafford Estates L.P.*, 71 S.W.3d 18 (Tex. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004). There is no conflict between the two state appellate court opinions.

Petitioner asserts that the dissent of three Justices of this Court to the denial of a petition for *certiorari* shows that the issue he poses is of concern to the Court. Pet. at 16, citing *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting, joined by Kennedy and Thomas, JJ). *Lambert* concerned a federal court of appeals decision that rejected a takings claim based on a denial of a permit application. 120 S. Ct. at 1550. The lower court had concluded that the denial was not based on the inadequacy of the petitioners' offer to pay for replacement costs, and the court had concluded that there was no taking because the government had not demanded anything. *Id.* The three justices who dissented from the denial of the *certiorari* petition did not express concern about any issue of a lack of contemporaneous rough proportionality findings but rather focused on the substantive requirements of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan*. Indeed, Justice Scalia noted his preference for "summary reversal, and

remand for conduct of the *Nollan-Dolan* analysis," had there not been a plausible basis for the lower court's decision. 120 S. Ct. at 1552. Petitioner's proposed rule triggers no need for a remand for further analysis. The dissenters expressly were concerned about *Dolan*'s substantive requirements, not about any particular procedural question. Moreover, the *Lambert* case did not concern whether a governmental entity could show rough proportionality at trial, and thus it is not on point. The dissent in *Lambert* does not demonstrate an existing controversy as to the question presented here.

C. The Oregon Court of Appeals' decision will not have the significant adverse impact Petitioner predicts.

Petitioner predicts widespread and dire consequences for property owners throughout the country if the Oregon Court of Appeals' decision is allowed to stand. Pet. at 17-18. Extrapolating from the City of Eugene's population figures and the alleged facts in this case, Petitioner postulates that "many thousands" of people may be subject to unconstitutional takings if the Court does not grant his petition. Pet. at 18. Other than noting the existence of the Texas court's decision is the *Flower Mound* case, Petitioner provides no "evidence" that a problem exists or is likely to exist.

An additional problem plagues Petitioner's prediction: His argument assumes a direct correlation between the mere making of rough proportionality findings and the constitutionality of an exaction. Findings may demonstrate that an exaction is justified, or the findings may be insufficient. The bare fact that a governmental entity makes findings does not satisfy its burden to show that an

exaction is roughly proportional to the impact of the proposed land use. A requirement that a governmental entity make contemporaneous findings would not guarantee the constitutionality of its actions. In the same way, the absence of findings does not *disprove* rough proportionality. The Oregon Court of Appeals' decision does not make *Dolan* meaningless because it does not relieve governments of their duty to show rough proportionality. Rather, it simply permits governments to demonstrate rough proportionality in the first proceeding in which the landowner raises a takings claim. This case does not involve a pressing issue of federal law.

CONCLUSION

Petitioner seeks review of an interlocutory order in a matter in which no federal issue is ripe for review. Additionally, the Oregon Court of Appeals' decision below correctly concluded that Petitioner is espousing a misapplication of *Dolan*. The petition for *certiorari* presents no pressing federal constitutional issue. The Court should deny the petition.

Respectfully submitted,

WILLIAM F. GARY, OSB #77032
Counsel of Record
JENS SCHMIDT, OSB #84341
JEFFERY J. MATTHEWS, OSB #97328
JAMES E. MOUNTAIN, OSB #75267
KARLA ALDERMAN, OSB #99207
HARRANG LONG GARY RUDNICK P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401
(541) 485-0220